



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyaga v Leaders Academy Limited (Cause 238 of 2016)  
[2022] KEELRC 1595 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1595 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 238 OF 2016  
JK GAKERI, J  
MAY 31, 2022**

**BETWEEN**

**LOISE WAMBUI NYAGA ..... CLAIMANT**

**AND**

**LEADERS ACADEMY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a memorandum of claim filed on February 22, 2016 alleging unlawful termination and non-payment of terminal dues.
2. The claim prays for:
  - i. A declaration that the action of the Respondent amounted to unlawful dismissal
  - ii. Sacco dues Kshs.5,400
  - iii. Notice of 2 months Kshs.39,930
  - iv. Gratuity allowance at 20% on the basic salary for 40 months Kshs.120,748
  - v. Compensation for unlawful loss of employment Kshs.239,580
  - vi. Interest (ii) to (iii) of Court rates
  - vii. Certificate of service
  - viii. Costs of the suit



### **Claimant's Case**

3. The Respondent employed the Claimant as an accountant on August 12, 2012 at Kshs.19,965/=. That the terms and conditions of employment were written. It is averred that on December 12, 2015 the Respondent summarily terminated the Claimant's employment without just cause or explanation.
4. It is further averred that the Respondent did not accord the Claimant an opportunity to respond to the allegations.
5. Finally, it is the Claimant's case that the Respondent violated the provisions of the *Employment Act*.

### **The Respondent's Case**

6. The Respondent filed its memorandum of reply on April 6, 2016. It denies that it employed the Claimant on August 12, 2012 or terminated her employment unfairly on December 12, 2015 and avers that the Claimant resigned from employment voluntarily and does not therefore qualify for the prayer sought.
7. In the Respondent's case that the Claimant's certificate of service is ready and the Claimant had been informed about it prior to the hand over.
8. It is further averred that the suit herein is the Claimants attempt to unjustly enrich herself as no contract of employment existed by the time she alleges to have been dismissed from employment.
9. That after resignation, no contract existed between the parties. It is further averred that after the notice period lapsed, the Claimant verbally asked whether she could be accommodated as she helped with the work as a replacement was sought and the Respondent agreed to accommodate her at no cost.

### **Claimant's Evidence**

10. The Claimant testified that she was engaged by the Respondent on August 12, 2012 as an accountant at a salary of Kshs.19,965/=. That on December 12, 2015, the director summoned her to his office and expressed dissatisfaction with her work and instructed her to hand over on December 14, 2015 and vacate the school compound. He locked the office to prevent access.
11. It is the Claimant's testimony that she wrote the Director on the November salary, 2 months' notice balance of the gratuity and Sacco share refunds.
12. That the handover did not take place on 14<sup>th</sup> December as contemplated it took place on December 28, 2015 at 3.30 pm when the Director reported to the office.
13. That the director did not clear the Claimant alleging that she had not handed over records on plumbing and materials. In her oral evidence in Court the Claimant testified that she handed over the resignation letter but continued working awaiting a response but none came on cross-examination, the Claimant confirmed that she wrote the resignation letter dated May 9, 2015 and did not enter into another contract of employment with the Respondent.
14. That she had no handover letter or report on record.

### **Respondent's Evidence**

15. RW1, Mr. George Ndirangu adopted his statement and testified that the Claimant was employed as an Accounts Clerk/Administration Officer in August, 2012 at Kshs.15,000/= with a 10% increment per year.



16. That she enjoyed several benefits including a two-bedroom house with all amenities, and discounted fees for one of her children until May 2015 when she served a resignation notice due to end on June 9, 2012 but did not leave. That the Claimant requested to stay on as the Respondent sought a replacement, a request the Respondent accepted as her child was a student in the school and her husband had been deployed to Somalia.
17. It was the RW1's testimony that when the Claimant was notified that a replacement had been found, her attitude changed and did not perform her duties as required and left when confronted about it without handing over and attempts to reach her were unsuccessful as she did not pick calls.
18. On cross-examination, the Respondent's witness confirmed that he accepted the Claimant's resignation and responded in writing with a copy to the Claimant.
19. That the Claimant was paid for the months she stayed on since she continued working. The discussion on the replacement was verbal. The witness further confirmed that no notice of termination was issued to the Claimant and she was not taken through any disciplinary hearing.
20. It was his testimony that the Claimant handed over partially and he did not sign the handover report.
21. Finally, the witness confirmed that attempts to reach the Claimant to collect the certificate of service were unsuccessful.
22. On re-examination, the witness stated that it was the Claimant who requested to stay on as her daughter was in class 8 and the request was accepted.

### **Claimant's Submissions**

23. The Claimant identifies seven issues for determination namely whether: -
  - i. The letter dated May 9, 2015 terminated the Claimant's employment.
  - ii. There was a legitimate and lawful expectation for renewal and extension of the contract.
  - iii. New contract was entered into and replaced the earlier contract
  - iv. Termination on December 12, 2015 was lawful.
  - v. Handing over was done upon termination.
  - vi. The Claimant is entitled to gratuity
  - vii. The Claimant is entitled to certificate of service.
24. On the first issue, it is submitted that the Claimant submitted a resignation letter giving a one month notice but the Respondent did not acknowledge receipt or respond or give the Claimant clear instructions. Reliance is placed on the decision in James Chutha Gatherer v Nation Media Group Limited [2013] eKLR.
25. As regards expectation of renewal of the employment contract, reliance is made on the decision in Robert Muriithi Ndegwa v Minister for Tourism [2012] eKLR to urge that Courts have upheld an employee's presumption of continuity of initial employment contract beyond its lapse.
26. That the Claimant continued working on the presumption that her resignation had been declined and the Respondent continued paying her salary, without change of duty or protest.



27. It is submitted that the contract dated August 12, 2012 continued because the Respondent did not respond to the resignation letter and coupled with the conduct of the parties. The Claimant continued working and the Respondent was paying wages per month.
28. As regards a new contract after the resignation letter, it is submitted that the Respondent availed no evidence of a new contract between the parties. The decision in *Bernard Mutuku Kimolo v East African Growers Limited* [2018] eKLR is relied upon to buttress the submission, as are the provisions of Sections 9 and 10 of the *Employment Act*.
29. As regards, the alleged termination of employment on 1December 2, 2015, the Claimant submits that the termination was unfair in that the Respondent gave no notice as RW1 confirmed in evidence, and no disciplinary hearing or warning letter for the Claimants changed behaviour as alleged by the Respondent and no reason was given.
30. The decision in *Joshua Rodney Marimba v Kenya Revenue Authority* [2019] eKLR is relied upon as are the provisions of Section 35(1)(c) and 37 of the *Employment Act*.
31. As regards the handing over, the Claimant submits that handing over was to place on December 14, 2015 but did not as the Director did not up up.
32. That on this day the Claimant received a letter from the customer care officer. The Claimant did not disclose the contents of the letter.
33. It is submitted that handing over took place on December 21, 2015 as well as on December 28, 2015.
34. As to whether the Claimant is entitled to gratuity the Claimant submits that she is by virtue of clause 3 of the contract since she served for more than 3 years and her service was un interrupted.
35. That the Claimant's evidence for gratuity is uncontroverted.
36. As regards entitlement to a certificate of service (wrongly described as contract of service), it is submitted that though RW1 testified that the certificate of service was ready and efforts to contact the Claimant had fallen through, he led no evidence of the alleged attempts or provide a copy of the certificate of service.
37. The decision in *Angela Wokabi Muoki v Tribe Hotel Ltd* [2017] eKLR is relied upon as authority on the duty of an employer to issue a certificate of service.

### **Respondent's Submission**

38. By May 18, 2022, when the Court retired to write this judgement, the Respondent had not filed its submissions after having been accorded 14 days on 17<sup>th</sup> February, 2022 and April 14, 2022.

### **Analysis and Determination**

39. From the pleadings, evidence on record and submissions by Counsel for the Claimant, the issues for determination are: -
  - i. Whether the Claimant's resignation letter dated May 9, 2015 terminated the contract of employment dated August 12, 2012;
  - ii. Whether termination of the Claimant's employment was lawful;
  - iii. Whether the Claimant is entitled to the reliefs sought.



40. As to whether the Claimants resignation terminated the contract of employment between the parties, it is not in dispute that the contractual relationship between the Claimant and the Respondent was embodied in the letter of appointment dated August 12, 2012 signed by the Claimant on August 15, 2012.
41. The Claimant appeared to have served the Respondent diligently after a 6 months' probation until May 9, 2015 when she submitted a notice of termination of services giving the employer the requisite one (1) month notice as provided by the contract of employment.
42. The Claimant admitted on cross examination that he authored the letter and served it upon the Respondent in person.
43. Although the RW1 confirmed that he received the letter of termination, the copy on record is neither signed nor stamped by the Respondent. Relatedly, although RW1 confirmed on cross-examination that he accepted the termination notice, he did not demonstrate how the acceptance was made known to the Claimant. But more importantly is the conduct of the Respondent after it received the letter. It did not respond to the Claimants notice of termination of service.
44. Puzzlingly, after effluxion of the notice period, the Claimant stayed on and continued working as before and the Respondent paid the wages due to the Claimant.
45. The Respondent's evidence that the Claimant requested to stay on and RW1 had no objection suggests that the Respondent had accepted the notice of termination. In fact, RW1 testified that although the Claimant had terminated the employment contract, he paid her on humanitarian grounds.
46. The witness further confirmed that the Claimant continued working for the Respondent after effluxion of the notice period.
47. Although the Respondent's witness testified that the Claimant stayed on to enable him secure a replacement, he had no documentary evidence of when the arrangement was entered into and what its terms were. From the evidence on record, it is not in dispute that the Claimant's employment with the Respondent was seamless until December 2015.
48. Clause 5 of the letter of appointment provided that:

“If you wish to terminate your service with the institution, you should serve the employer with one (1) month notice in writing failure to which you shall forfeit your one month salary in lieu of notice. In case the employer wishes to terminated your services for any reason whatsoever, he should serve you with one month notice in writing and also pay one month's salary in lieu of notice.”
49. The Claimant acted in accordance with this clause. This clause is also generally consistent with the provision of the *Employment Act*.
50. In *James Chutha Gatherer v Nation Media Group Limited* [2013] eKLR the Court expressed itself as follows, regarding termination notice;

“Therefore, a termination notice becomes very important as based on this notice other processes must commence. Acceptance of the notice where an employee must serve the term of notice acceptance of the notice and payment in lieu of serving the term of notice or acceptance of the notice and a waiver of the term of notice period or a waiver under terms as agreed between the parties. A notice can also be rejected by an employer on good reasons. These are the terminal processes of the employment contract. However, the duty



to explain these procedures and or process rests with the employer even where the employee gives notice to terminate an employment contract. These explanations must be done with certainty and without ambiguity and failure on the part of the employer to do so and the employee ends up in a situation which creates conflict due to lack of proper instructions, the employer is deemed to be in fault. This is outlined under section 35(3) and (4) of the Act.”

51. The Court is in agreement with these sentiments.
52. In this case, the Claimant notified the Respondent her intentions to terminate the employment contract by letter dated May 9, 2015 and legitimately expected the Respondent to respond in kind setting out the parameters and actionables for the impending separation, including payments.
53. Conversely, the Respondent could also have rejected the notice and made another proposal or decision. In other words, the Claimant’s letter kick started a process which the Respondent failed or neglected to participate in rendering the letter dated May 9, 2015 in effectual.
54. An employer is constrained to acknowledge receipt of a termination of employment letter and either accept or reject the proposed course of action. By its passivity in responding to the termination notice and charting a way forward, the Respondent, by its conduct made a representation to Claimant that she could continue working and was in fact paid, which affirmed the representation. Having relied on the representation and changed her legal position, the Respondent is estopped from acting contrary to its representation. See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.
55. For the foregoing reasons, the Court is satisfied that the Claimant has on a balance of probabilities established that the notice of termination of employment dated May 9, 2015 did not terminate the contract of employment dated August 2, 2012.
56. As to whether termination of the Claimant’s employment by the Respondent was lawful, the springboard are the relevant provisions of the *Employment Act*, 2007. The provisions of Sections 35, 41, 43, 44, 45 and 47(5) constitute the substratum of the law on termination of employment contracts.
57. In summary, these provisions prescribe the requirements germane to notice, procedural steps to be complied, burden of proof, exemplifications of gross misconduct and justification of termination. Section 45(2) of the Employment is the bedrock of fair termination.
58. The Section provides that:-
  - (2) A termination of employment by an employer is unfair if the employer fails to proof-
    - a. That the reason for the termination valid
    - b. That the reason for the termination is a fair reason
      - i. Related to the employees conduct capacity or compatibility or;
      - ii. Based on the operational requirements of the employer; and
    - c. That the employment was terminated in accordance with fair procedure.
59. This provision encapsulates the test which every termination of employment must pass to qualify as fair. A termination of employment must be substantively justifiable and procedurally fair. The test has been elaborated in many decisions such as *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR and the Court of Appeal decisions in *Naima Khamis v Oxford University Press [EA] Ltd* [2017] eKLR and *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR among others.



60. In a nutshell, for a termination of employment to pass muster it must be substantively justifiable and procedurally fair.
61. In the instant case, the Claimant testifies that she discharged her duties from May 2015 to 12<sup>th</sup> December 2015, when her employment was terminated without any notice, warning or disciplinary hearing and handed over on December 21, 2015 as well as December 28, 2015. However, the Claimant had no documentary evidence of the handover process.
62. Be that as it may, the Respondents witness confirmed on cross examination that he prepared the certificate of service but attempts to reach the Claimants to collect the document fell through. This testimony lends credence to the Claimant's testimony that she cleared and handed over as required. RW1 also confirmed that the Claimant handed over partially.
63. The Claimants case that termination of the contract of employment was unfair is reinforced by RW1's confirmation on cross-examination that he did not issue a notice or warning to the Claimant because in his view, the Claimant continued working for the Respondent on humanitarian grounds and would not be in employment for long.
64. Finally, the witness confirmed that the Claimant was not taken through a disciplinary hearing.
65. For the foregoing reasons, it is the finding of the Court that the termination of Claimant's employment on December 12, 2015 was unlawful for noncompliance with the provisions of the [Employment Act 2007](#).
66. As regards entitlement to the relief sought, the Court proceeds as follows;
- i. A declaration that the action of the Respondent amounted to unlawful dismissal
67. Having found that termination of the Claimant's employment by the Respondent was unfair, a declaration to that effect is hereby issued.
- ii. Sacco dues Kshs.5,400/=
68. The Respondent admitted this claim, the Claimant is awarded Kshs.5,400/= as Sacco dues.
- iii. Notice for two months Kshs.39,930/=
69. This prayer is grounded on clauses 5 of the Claimant's letter of appointment dated August 12, 2012 which provides that:
- “.... In case the employer wishes to terminate your service for any reason whatsoever, he should serve you with one month notice in writing and also pay you one month salary in lieu of notice”.
70. A plain reading of this statement reveals that the employer is obligated to pay for the month served under notice and pay another one (1) months' salary in lieu of notice yet notice has already been given. The Respondent did not contest the amount claimed by the Claimant under this head. In the circumstances, the sum of Kshs.39,930/= is awarded.
- iv. Gratuity Allowance at 20% on the basic salary for 40 months.
71. This prayer is grounded on clause 3 of the letter of appointment which provides that “Upon completion of three (3) years of service you will be entitled to gratuity payment which is calculated at 20% of the current monthly salary for the period worked”.



72. It is common ground that the Claimant served the Respondent for over 3 years without interruption and thus qualifies for gratuity in terms of clause 3 of the letter of appointment. The Claimant admitted that she received a third of the gratuity payment and is now claiming the balance. Based on the

Claimant's computation, it is unclear whether the  $\frac{1}{3}$  has been deducted or the sum is all inclusive. The Court is satisfied that the Claimant is entitled to two thirds of the gratuity due and the same is awarded.

v. Compensation for unlawful loss of employment (Kshs.19,965 x 12) = Kshs.239,580/=

73. Having found that termination of the Claimants employment was unlawful, the Claimant becomes entitled to the relief provided by Section 49(1)(c) of the Employment Act 2007.

74. As ordained by Section 49(4) of the Act, the Court has taken the following factors into consideration.

i. The Claimant was an employee of the Respondent for a duration of about 3 years and 3 months which is not a long period. From the evidence on record, it is unclear whether the Claimant wished to continue in the employment of the Respondent.

ii. From the evidence on record, the Claimant had no previous complaint about her performance or any other issue or warning letter.

iii. The Claimant did not appeal the decision to terminate her employment contract.

iv. The Claimant had by letter dated 9<sup>th</sup> May intimated her desire to terminate the employment relationship but the Respondent did not accept or reject the notice and the Claimant continued working and the Respondent paid her for the services rendered.

75. In the circumstances the equivalent of three months' gross salary is fair Kshs.59,895/=.

v. Certificate of service

76. The Claimant is entitled to a certificate of service by dint of Section 51(1) of the Employment Act, 2007.

77. Consequently, judgment is entered for the Claimant against the Respondent in the following terms;

a. Sacco dues Kshs.5,400/=.

b. Two months' notice Kshs.39,930/=.

c. Two thirds gratuity payment.

d. 3 months' salary as compensation Kshs.59,895/=.

e. Certificate of service

f. Costs and interest at Court rate from the date hereof till payment in full.

78. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF MAY 2022**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**



In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

